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Supreme Court of the United States

No. 372

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

MARGARET W. VESTER,
Respondent.

No. 373

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS,
Respondents.

No. 374

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

LLEWELLYN B. REAKIRT,
Respondent.

BRIEF OF THE CITY OF CINCINNATI, PETITIONER

JOHN D. ELLIS,
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REPORT OF LOWER COURT OPINIONS

The opinion of the Circuit Court of Appeals (Sixth Circuit), is reported in 33 F. 2d 242. It is printed in the record of this case at page 103.

The opinion of the District Court (So. Dist. of Ohio) appears not to have been officially reported. It may be found in the printed record at page 26.

I. STATEMENT OF THE CASE

Article XVIII, Section 10, of the Constitution of Ohio, provides as follows:

> Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

Acting under the foregoing constitutional authority, the council of the city of Cincinnati on July 6, 1927, passed a resolution "Declaring the intention to appropriate property for street widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement." (R. p. 85, Defts. Ex. A.)

On March 21, 1928, council passed Ordinance No. 155-1928 appropriating the property and directing the city solicitor to apply to a court of competent jurisdiction to have a jury impaneled to assess compensation. (R. p. 88, Defts. Ex. B.) On May 4, 1928, the city solicitor filed such an application in the Common Pleas Court of Hamilton County, Ohio.

The three plaintiffs below thereafter filed suits in the United States District Court to enjoin the city from proceeding with the appropriation proceedings, on the grounds, first, that the application of the power of eminent domain to their excess property constituted a denial of due process of law, and second, that they were being deprived of the equal protection of the law.

The appropriation proceedings taken by the city were in strict conformity with the statutes of Ohio. (See Ohio General Code, Secs. 3677, 3679, 3680, 3681, 3682.) There is no claim in this case that the city failed in any respect to comply with the law of Ohio relating to the procedure for the appropriation of property.

The purpose of this appropriation was the widening of East Fifth Street from Main Street to Pike Street by adding to the present width of sixty-six feet a strip of land on the south side thereof twenty-five feet wide. This strip was included in both the resolution declaring intention and the appropriating ordinance. Plaintiffs below make no objection to this appropriation. The resolution and ordinance, however, apply the principle of excess condemnation to this street widening, by appropriating also the entire remnant of every parcel truncated by the widening, and, in addition, five small lots fronting on intersecting streets but lying entirely within a line drawn seventy-five feet south of the new street line.

The plat (Bk. of Ex. Pff. Ex. 1), will show that throughout its length, the excess appropriated has a depth of seventy-five feet, with the exception of three parcels in the short half-block from Lawson Alley to Sycamore Street, where the original depth was one hundred and forty-nine feet, leaving an excess of one hundred and twenty-four feet.

The properties of the three plaintiffs present typical cases of excess condemnation as follows:

1. Mrs. Vester's lot fronts twenty-seven feet on an intersecting street, Broadway, having a depth of ninety-nine

feet parallel with and at a distance of nineteen feet from the new south line of Fifth Street (Bk. of Ex. Pff. Ex. 1). It is occupied by an old building (R. p. 18, Bk. of Ex. Defs. Ex. G), and lies entirely within the excess appropriation.

2. The Richards lot lies near Pike Street, fronting twenty-three feet on Fifth Street, and extending back one hundred feet to a twenty foot alley called Buchanan Street. This lot is occupied by an old building which comes to the present street line and would be cut in two by the twenty-five foot line. The remnant would be 23 by 75 feet. (R. pp. 18, 20; Bk. of Ex. Pff. Ex. 1, Def. Ex. E.)

3. The Reakirt property is one of three large lots between Lawson Alley and Sycamore Street which have a present depth of 149 feet. It lies at the corner of Sycamore and is at present not occupied by any permanent building, being used for a gas station and outdoor garage. Its remnant would be 138 by 124 feet. (R. p. 15; Bk. of Ex. Pff. Ex. 1, Def. Ex. L.)

The two squares of Fifth Street in the city of Cincinnati west of Main Street, known respectively as Government Square and Fountain Square may be called the heart of Cincinnati. The width of the street in these two squares is 130 feet from property line to property line. East of Main Street, Fifth Street becomes a sixty-foot street with a forty foot roadway. The street is an important artery for a very large part of the street car and automobile traffic proceeding to the eastern hills of the city. Owing to the topography of the city, there is but one main direct approach to the eastern hills at the present time. Recently an ambitious plan has been worked out and bonds have been authorized by the electors of the city of Cincinnati for the construction of a large viaduct and boulevard, referred to generally as the Third Street-Columbia Avenue improvement. (Bk. of Ex. Defts. Ex. R), which is to constitute a new main direct highway to the eastern hills proceeding

further to the east before turning north. Fifth Street from Main Street to Pike Street (a distance of five squares east) will form a part of the most direct approach to this proposed boulevard.

In anticipation of these plans, the city several years ago determined to increase the width of Fifth Street east of Main Street by adding twenty-five feet on the south side, the north line of the street being a continuation of the north line west of Main Street. Pursuant to the city's plan, two magnificent buildings, to-wit, the Masonic Temple (Bk. of Ex. Def. Ex. U), and the Fontbonne Building (Bk. of Ex. Def. Ex. F), each occupying a full square on the south side of Fifth Street, have been erected and set back to the proposed building line. The people of the city of Cincinnati in 1925, by popular vote, authorized the issue of two million dollars worth of municipal bonds for the purpose of improving and widening East Fifth Street.

In undertaking the improvement, the city council determined to make use of the powers of excess condemnation authorized by the state constitution. The arguments in favor of this procedure were, in the main, as follows:

1. In the case of most parcels, the cost of the twenty-five foot strip, plus damages to residue, would almost, if not quite, equal the fair value of the entire parcel.

2. The city by owning the remnant properties could provide directly against the indefinite maintenance on them of unsatisfactory, mutilated or patched buildings; also against other undesirable temporary uses such as billboards, etc., intended to provide minor revenues while the owners carried their property for speculative purposes.

3. By aggregating the various lots, it could provide needed tracts of adequate size for business buildings of various kinds suited to the new improvement.

4. The net result would be that at relatively small cost, the city would, in a comparatively short number of years

have not only a new broad street but also a building development on the south side in harmony with the street improvement.

5. The development on the south side would hasten a corresponding development on the north side.

A glance at the plat (Bk. of Ex. Pff. Ex. 1), will show that in laying out its excess condemnation district council adopted a reasonable method. It took, in its entirety, every parcel from Main to Pike Street fronting on the south side of Fifth Street, excepting the Masonic Temple Building and the Fontbonne Building, to which reference has heretofore been made. In addition it took three small lots on the east side of Broadway south of Fifth Street not abutting on Fifth Street (Bk. of Ex. Def. Ex. G), but lying within one hundred feet of it, and similarly it took two small tracts on the west side of Pike Street lying within one hundred feet of Fifth Street. (Bk. of Ex. Def. Ex. C.)

The District Court enjoined the city from proceeding with its excess appropriation, holding that the taking of the excess was not for a public use and therefore deprived plaintiffs of their property without due process of law. This holding was affirmed by the Circuit Court of Appeals.

II. SPECIFICATION OF ERRORS

The errors complained of in these proceedings may be stated as follows:

1. The Court of Appeals erred in holding that the proposed excess condemnation deprived plaintiffs of their property without due process of law.

2. The Court of Appeals erred in holding that the taking of the excess property was not for a public use.

III. ARGUMENT

Since this is the first time that the constitutionality of excess condemnation has been before a federal court, a brief statement of the general theory and purpose of that method of appropriation may be helpful.

A. The History of Excess Condemnation *

Excess condemnation may be defined broadly as the policy, on the part of a state or city, of taking by right of eminent domain more property than is actually occupied by a public improvement, and of subsequently selling or leasing this surplus.

The first legislation relating thereto appears to have been in New York in 1812. England adopted the principle in 1845, France in 1850, Italy in 1865 and Belgium in 1867. Since that time, largely since 1900, many states of the United States have enacted statutes providing for excess condemnation. The following states have adopted constitutional amendments authorizing it:

Massachusetts, 1911, Art. 70 (rearrangement).
Massachusetts, 1915, Art. 66 (rearrangement).
Ohio, 1912, Art. XVIII, Sec. 10.
Wisconsin, 1912, Art. XI, Sec. 3-a.
New York, 1913, Art. I, Sec. 7.
Rhode Island, 1916, Art. XVII.
Michigan, 1928, Art. XIII, Sec. 5.
California, 1928, Art. I, Sec. 14½.
Virginia, 1928, Sec. 58.

(For the text of these sections, see appendix, pp. 67-70.)

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* Upon the general question of the history, theory and practice of excess condemnation, see:
Excess Condemnation. Robert E. Cushman, D. Appleton, 1917.
Excess Condemnation. A Report by the Committee on Taxation, City of New York, 1915.
Excess Condemnation. A Report Prepared by the Chicago Bureau of Public Efficiency, 1918.

The outstanding historical use of excess condemnation was the establishment of the boulevard system of Paris under the direction of Baron Haussmann during the reign of Napoleon III. Fifty-six miles of streets were planned and constructed on this basis. In London one hundred and three streets have been laid out and built using excess condemnation, chief among them Kingsway, running from the Strand to Holborn, eleven hundred yards long and one hundred feet wide.

In the United States, New York City has used excess condemnation in the opening of Third, Fourth, Sixth, Thirteenth and Fourteenth Streets, Seventh Avenue, Cedar Street, Lewis Street, Exchange Place, Lafayette Place and many other improvements. The city of Rochester has also made extensive use of the method. Other cities have made occasional use of it.

From the foregoing it would appear that both in principle and in practice excess condemnation is fairly well established as a recognized method of handling large public real estate problems in a modern way.

B. The Purpose of Excess Condemnation

In using excess condemnation, legislative bodies generally have in view all of the following three purposes:

1. The avoidance of remnant lots.
2. The preservation and amplification of the improvement.
3. Recoupment of expense from increased values.

1. Avoidance of Remnants

Particularly in the case of appropriations for new streets laid out diagonally across existing lot lines, remnants of land of various sizes and shapes are frequently left, of little or no value to their owners and capable of appropriate use only in connection with adjacent land. If left to the

hazards of private bargaining, they are likely to lie neglected or misused for long periods of time. Incidentally, the city usually pays a price adequate to include the remnant while taking only the part used. Furthermore, if a portion of the improvement is to be paid for by assessment on property benefited, the existence of the remnants operates to prevent an intelligent and equitable distribution of the assessment.

By the use of excess condemnation, the city can facilitate the disposition of these remnants to the best public advantage.

2. *Preservation and Amplification of the Improvement*

Our modern era is an era of city planning. New towns are laid out in advance of their use and we attempt to make our old towns more usable by applying the principles of planning and zoning.

Sometimes an improvement fails to render its greatest return because of the narrow basis on which it is made. For example, a city may lay out a broad highway suitable for handsome business and residence buildings, but if the highway is to be handicapped at the start with lot lines at odd angles and of odd sizes and with the drab remains of mutilated and otherwise unsuitable buildings, it will be merely another street, perhaps drearier than those already in existence. Again a highway intended to open up new territory for needed homes may fail of its real purpose, if the city does not take steps to see that the necessary development follows the improvement.

By excess condemnation, a city may often, at little extra expense, not only establish the improvement, but also facilitate and hasten the development of the adjoining area in harmony with the improvement. Surely the achievement of additional convenience in the arrangements for business, industry and residence is a proper public purpose.

3. Recoupment of Expense

In the laying out of a real estate subdivision, private developers figure their expense to include cost of land, cost of street, sewer, water and other improvements, and carrying charges such as interest and taxes. Against this they set what they calculate the selling price of the land will be after the improvement. The increment must be large enough to take care of the expense and give them a profit for their efforts. This is sound business and sound sense.

A city does not ordinarily lay out subdivisions, although it is conceivable that the exigencies of the situation may at times require it, and the constitution of Massachusetts (Art. 66) specifically authorizes such a proceeding. However, when a great public improvement such as the one under consideration in this case is undertaken by a city, a financial situation similar to the subdivision development is likely to be presented. The city faces the same items of expense and the same increase in land value. But under ordinary methods of financing improvements, the parallel ends there. In most cases, the general taxpayers pay the entire cost of the improvement subject to such reimbursement, seldom as much as fifty per cent of the construction costs, as the city can obtain by assessment. The increased value of the abutting lands goes to the owners without effort on their part.

Where the expense is heavy and the increase in value great, it would seem to be an imposition on the general taxpayers to proceed on the old basis. Excess condemnation enables the city to treat the improvement and any part of the abutting property as one real estate problem to be handled to the best advantage for the taxpayers.

When a proper case for the application of excess condemnation arises, it is sound financial sense and sound financial morality to make use of it. The purpose is clearly the public benefit.

C. Analysis of the Meaning of Due Process of Law in These Cases

Plaintiffs object to the excess appropriation attempted in these cases by the city on the ground that it deprives them of their property without due process of law. It is to be remembered that the city proposes to compensate them in full for the present value of their properties as they stand. Furthermore, it is clear that none of these properties is a homestead or anything more than a speculative real estate investment. What these property owners therefore desire to preserve is not their property but the hope of an increased value in dollars and cents to come to their property after the improvement is made. This is the sacred property right for which the Fourteenth Amendment is invoked.

Any law expressing a new idea in government, no matter how general its terms nor how uniform its operation, must expect to run the gauntlet of an attack under the Fourteenth Amendment, if, in a particular situation, the upsetting of the law would work to the private advantage of some individual or group.

Among new ideas in government which private parties have attempted to defeat in the courts by resort to the Fourteenth Amendment, at least six stand out prominently to prove that that amendment was not intended to suppress progress, to-wit:

1. The right of states to limit trial by jury. *Walker* v. *Sauvinet*, 92 U. S. 90.
2. The assessment of benefited real estate to pay part of the expense of a public improvement. *Davidson* v. *New Orleans*, 96 U. S. 97.
3. Indictment by information instead of by grand jury. *Hurtado* v. *California*, 110 U. S. 516.
4. The establishment of swamp land reclamation districts on an assessment basis. *Hagar* v. *Reclamation District*, 111 U. S. 701.

5. The establishment of irrigation districts on an assessment basis. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.
6. Zoning laws. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365.

The underlying idea of "due process of law" is fairly simple. To meet its requirements, a statute affecting the pursuits or property of individuals needs only the following:

1. *It must be law.* As said in *Hurtado* v. *California*, *supra*, at page 535:

> "Law is something more than mere will exercised as an act of power. It must be not a special rule for a particular person in a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

2. *In its dealings with the individual, the statute must provide process.* Referring again to the quotation from the Hurtado case, it must provide for a hearing "before condemning," it must proceed "upon inquiry" and it must render "judgment only after trial."

3. *The process must be due process.* There must be the usual and reasonable provisions as to notice, time and place of trial, etc.

1. There is Due Process

Counsel believe that the provision of the constitution of Ohio under attack in these cases meets every requirement of "due process of law." The second and third requirements have certainly been met in the process taken by the city. The provisions of the Ohio statutes for the condemnation of land are found in Ohio General Code, Secs. 3677, 3679, 3680, 3681, 3682, and 3691.

The procedure followed under these statutes is as follows:

1. The city council passes a resolution declaring its intention of appropriating the property, describing the land to be taken. (G. C. 3679.)

2. A copy of this resolution is served upon all property owners involved, by personal service if they are residents, by legal publication if they are non-residents. (G. C. 3680.)

3. After service is complete the city council passes an ordinance appropriating the property and again describing the land to be taken. The city solicitor is directed to apply to a court of competent jurisdiction to empanel a jury to determine the value of the land appropriated. This ordinance is published according to law. (G. C. 3680.)

4. The city solicitor files a petition in the Common Pleas Court describing the land by metes and bounds and praying that the value may be assessed by a jury. Service is had upon the defendant (the property owner) as in all civil suits under the Ohio law. (G. C. 3681, 3682.)

5. A jury is empaneled according to law; both the city and the property owner present their evidence of value and the jury brings in a verdict which is their finding as to value. (G. C. 3683.)

6. The property owner may file a motion for new trial. If this is overruled a judgment is rendered against the city in the amount of the verdict.

7. The city gets title to the land only after payment to the owner of the compensation assessed. (G. C. 3691.)

8. After judgment the property owner may take his case to the Court of Appeals on error and to the Supreme Court on motion to certify. (G. C. 3695.) The city may within six months of the judgment pay the judgment with interest and enter into possession, or it may refuse to take the land, in which case the city must pay the costs and expenses incurred by the property owner. (G. C. 3697.)

This procedure the city followed in the cases at bar up to the point where it was enjoined by the District Court. We submit that so far as process is concerned there can be no question as to the full and ample protection of the land owner. He has due notice of every step the city takes; he has his day in court; a jury assesses the amount of compensation he is to receive; he may appeal from its verdict; he must be paid that sum before the city can take his land.

2. Complainant's Objection must be that the Ohio Constitution, Art. XVIII, Sec. 10, is not within the Category of "Law"

It being clear that the proceedings in excess condemnation cases provide for "process" and that the process is "due process," it would seem that plaintiffs rest their contentions on some claim that Section 10, of Article XVIII of the Ohio Constitution is not "law"; in other words, that in adopting the said section the people of Ohio authorized an arbitrary act of confiscation unreasonable in its purpose and in the means provided for the accomplishment of that purpose. We submit that this provision of the Ohio constitution is not the product of the arbitrary whim of a despot; it is the reasoned expression of law adopted by a constitutional convention of the elected representatives of the people of Ohio and approved by the votes of the people of Ohio. Furthermore, it is in harmony with reasoned constitutional provisions and statutes of other states and other nations. Finally, in its procedure, it is applied with exactly the same "due process" used in ordinary cases of appropriation of property.

As well said in the Hurtado case, supra, at page 537:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legis-

lative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

As has been pointed out by the decisions, "due process of law" is the practical equivalent of the old phrase "according to the law of the land." When plaintiffs object to the action of the city of Cincinnati in taking their property by excess condemnation, they say that such a taking is not "according to the law of the land." The constitution of a particular state being the highest expression of the "law of the land" for that state, it seems almost a contradiction in terms to say that the highest law of the state is not the law of the land.

It is conceivable that in some time of stress and bitter feeling, the people of a state might declare as part of their constitution some piece of atrocity aimed at particular individual members or groups of the community and that a court would have to hold that such a provision could not be law even when solemnly adopted by vote of the electors. And this would be true even were there no Fourteenth Amendment or any constitutional provision whatever. It would be true in England with no constitution so long as English courts recognized the fundamental principles of liberty and a government of freemen.

But no such situation exists here. Excess condemnation laws are not aimed at individuals. They are laws in the highest sense, in that they are remedial legislation intended for the general welfare, having general application, and carried into effect in accordance with general procedure.

The city of Cincinnati in these cases has no personal motive. It is not seeking to punish the owners of property on East Fifth Street, neither is it proposing to turn their property over to some favorite of the government. It has a mixed problem of city planning and city finance on its hands and it is proposing to work out this problem on a

basis that will be fair to the property owners and to the general taxpayers of the city.

The citizens of Ohio have done everything they could to make excess condemnation the law of the land in their state. If what they have done is not sufficient, then excess condemnation is forever prohibited to them. And what applies to excess condemnation must, if we are to be logical, apply to every new governmental principle evolved in the fullness of time to meet some new situation. The answer in every case, as in this case, will be, "Our fathers have not done so."

This Court has said in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110:

> "In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

3. Due Process of Law is not Synonymous with Public Use

Our opponents claim that the purpose of this condemnation is a private one and therefore violates the Fourteenth Amendment. They claim that it amounts to taking the property of A and giving it to B. If this were the true state of fact then the Fourteenth Amendment need not be invoked, for such a legislative act would be void as beyond the power of government, irrespective of constitutional

limitations. But the facts are not as claimed. The city here takes A's land only after a judicial determination of value and after A is fully compensated for every element of value taken from him. Nor in this case is the land given to B. Upon the record, the city may never part with the land. It may keep it. But if it does sell the land, under the Ohio law it can do so only upon public advertisement and sale to the highest bidder. (Ohio Gen. Code, Secs. 3698, 3699.) The act of the city, therefore, is not an act of confiscation transcending the powers of government.

Where then is the Fourteenth Amendment involved?

In this connection we wish to point out the significant difference between the Fifth Amendment, applying to the federal government, and the Fourteenth Amendment, applying to the states.

The Fifth Amendment reads:

> "nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment reads:

> "nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

In the latter no mention is made of taking private property for public use and the fact that the framers of the Fourteenth Amendment had before them the Fifth Amendment would indicate that the omission was deliberate and that there was no intention to confer on the federal government jurisdiction to interfere with the exercise of the power of eminent domain by the states.

We meet the federal question, therefore, not within the field of public use as used in the Fifth Amendment but under the due process clause of the Fourteenth Amendment.

The case stands before this Court exactly as though there were no such term as "public use," either in the state or federal constitution. The only question here raised is due process.

There is no limitation in the federal constitution limiting the exercise of the power of eminent domain by the states to cases of public use. Eminent domain, like the police power and the power of taxation, is an attribute of the sovereignty of a state, and like all other sovereign powers it must be exercised by the state for the public good or public benefit. Like other powers, the exercise of eminent domain may be limited by a state constitution; in fact many states limit the power of eminent domain to cases of public use and give a very restricted meaning to public use. But a state may, if it wishes, make no constitutional limitation upon the power, or it may specifically provide in its constitution that the power may be exercised for a certain purpose. This is exactly what the state of Ohio has done, when by its constitution it provided that the power of eminent domain could be exercised in the manner known as excess condemnation.

In discussing the validity of this provision we must consider whether or not the Court must say that the state in its constitutional exercise of its sovereign power of eminent domain is acting in an arbitrary or unreasonable manner. Specifically, in the case at bar, the state has declared that a use of eminent domain for purposes of excess condemnation is an exercise of sovereign power for the public good or benefit. Must the Court find that in so doing the state has acted in an arbitrary or unreasonable manner?

This, we submit, is only another way of saying that under the Fourteenth Amendment the state constitution must not be an arbitrary whim not within the category of "law."

The Supreme Court has never made due process synonymous with public use. To do so would be in effect to make the Fifth Amendment applicable to the states.

We are aware of the language of this Court in certain cases where it is said that the Court considers public use under the Fourteenth Amendment. But every such case is one in which the distinction here made was of no importance. In each case the state constitution limited eminent domain to public use, and the state legislature enacted a law under that constitutional limitation providing for an exercise of eminent domain. No case has come before this Court where a state constitution was attacked as violating the Fourteenth Amendment because of the adoption of a particular limitation upon the power of eminent domain.

Furthermore, in every case in which the Supreme Court has considered under the Fourteenth Amendment the validity of a state statute providing for eminent domain, it has concerned itself with an examination of the arbitrary character of the legislation. It has sustained the legislation unless it was unable to find a rational basis for the public character claimed for the statute. The cases discussed in this brief will illustrate this point.

If, then, the question of public use is to be discussed in this case it must be in the sense that the constitution of Ohio in Art. XVIII, Sec. 10, has sought by eminent domain to accomplish an arbitrary act of confiscation not reasonably related to any public purpose or benefit and beyond the inherent power of the people of Ohio in exercising their sovereignty.

The plaintiffs, however, press their argument beyond this view of public use. They claim that the taking must be not merely for a public purpose but that the *property taken must be actually occupied by the improvement.*

Such a claim reduced to its simplest terms says that unless the public actually possesses and uses the land taken, the taking has been without due process of law. In other words, due process means public occupancy. A rule of thumb of this sort would be very convenient, no doubt, but

this Court has in numerous cases expressly refused to adopt such a rule, and it has done so for the reason that it has always considered as the vital question, the reasonable or arbitrary character of the law under examination.

As was said in *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Power Co.*, 240 U. S. 30, 32:

> "The inadequacy of use by the general public as a universal test is established."

See also:
Head v. *Amoskeag Mfg. Co.*, 113 U. S. 9;
Fallbrook Irrigation Co. v. *Bradley*, 164 U. S. 112;
Clark v. *Nash*, 198 U. S. 361;
Strickley v. *Highland Boy Gold Mining Co.*, 200 U. S. 527;
Hairston v. *Railway*, 208 U. S. 598.

In *Block* v. *Hirsch*, 256 U. S. 135, this Court, after citing the Clark case and the Strickley case, said, p. 155:

> "They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest . . . and that the public interest may extend to the use of land."

The approach of this Court to a question of the validity of a statutory declaration as to a particular public use is clearly based upon the reasonable character of the purpose the state seeks to accomplish and of the means adopted to attain that purpose.

Of course the Court will not substitute its judgment for that of the people of a state. As was held in *Clark* v. *Nash*, 198 U. S. 361, 369:

> "This Court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject and we have said that the people of a state, as also its courts, must in the nature of things be more familiar with such facts and with the

necessity and occasion for the irrigation of land than can anyone be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weights with the state court."

Old Dominion Land Co. v. *U. S.*, 269 U. S. 53, 66.

"Congress has declared the purpose to be a public use, by implication if not by express words . . . Its decision is entitled to deference until it is shown to involve an impossibility."

In this connection we wish to point out that we are dealing with the constitution of the state of Ohio adopted directly by the people of the state. As such it is the most basic declaration of law of which the people of Ohio are capable. While it is true that not even the people of a state may violate the constitution of the United States, it is equally true that under the well known decisions of this Court a state constitution should not be declared void unless an imperative case of unconstitutionality arises. If the acts of a state legislature or of Congress or the decisions of a state court are "entitled to deference until they are shown to involve an impossibility," we submit that the constitution of Ohio is entitled to even greater deference and weight and that unless clearly and unmistakably arbitrary and confiscatory should be upheld by this Court.

D. Excess Condemnation is Directed to a Public Good and is an Entirely Reasonable Method of Exercising the Power of Eminent Domain

By way of introduction to this point of our argument, we wish to quote Mr. Justice Brewer's comment in *Muller* v. *Oregon*, 208 U. S. 412, 419-421:

"In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may

not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

1. Widespread Legislation Providing for Excess Condemnation Indicates that it is Considered a Reasonable Method

The fact that the people of eight states have provided in their constitutions for excess condemnation is in itself an indication that they considered that there was a need for such a power.

In addition to the constitutional provisions already noted the following states have at various times enacted statutes providing for excess condemnation:

Connecticut.	Spec. Laws 1907, p. 43, for Hartford.
	Spec. Laws 1913, p. 243, for New Haven.
Illinois.	Laws, 1927, p. 227, for Chicago.
Maryland.	Laws 1906, ch. 108, for Baltimore.
	Laws 1908, ch. 166, for Baltimore.
Massachusetts.	Laws 1912, ch. 186, for Worcester, Belmont St.
	Laws 1913, ch. 201, for Worcester.
	Laws 1913, ch. 326, for Worcester, Washington St.
	Laws 1913, ch. 703, for Salem, Bridge St.
	Laws 1913, ch. 778, for Swampscott, Humphrey St.
New Jersey.	Laws 1870, ch. 117, for Newark.
New York.	Laws 1911, ch. 776, for New York City wharves and terminals.
	Laws 1914, ch. 300, for Syracuse.
	Laws 1915, ch. 593, for New York City, general improvements.
	Laws 1920, ch. 431, for Rochester.
	Laws 1920, ch. 439, for Buffalo.
	Laws 1923, ch. 665, for Jamestown.
	Laws 1923, ch. 170, for Niagara Falls, widening Main St.
	Laws 1926, ch. 556, for Yonkers.
	Laws 1928, ch. 545, for Poughkeepsie.
	Laws 1929, ch. 538, for Erie County.
Ohio.	97 Ohio Laws 334. General act for municipal parks, buildings, etc.
Oregon.	General Laws, Secs. 3837 to 3844. General act for cities.

Pennsylvania.	1907, No. 315. General act for municipal parks, parkways and playgrounds.
Virginia.	Laws 1906, ch. 194. General act for cities. Laws 1916, ch. 71. Enlarging powers of above.
Wisconsin.	Laws 1909, ch. 162. General act for municipal parks, etc. Laws 1911, ch. 486. General act for converting city streets into parkways.

The British Parliament in 1845 passed the Land Clauses Consolidation Act (8 and 9 Vict., ch. 18), and thereafter numerous special acts each providing for excess condemnation: London County Council Act (Holborn-Strand Improvement) 1899, 62 and 63 Vict., ch. CCLXVI, Sec. 33; London County Council Act 1901, 1 Ed. 7, CCLXXI, Sec. 52; Mall Approach Act, Parliamentary Papers, 1914, Vol. VIII, Bill 259. France in 1852 enacted such a law. (Decree of March 26 1852; Duvergier, Collection des Lois, Vol. LII, p. 282.) This was modified in some particulars in 1912. (Law of April 10, 1912, Collection Complete des Lois, etc. (new series, Vol. XII). Belgium passed an excess condemnation statute in 1867 (1904 Mass. House Doc. 1096).

The Lex Adickes, passed by the Prussian Landtag in 1902 (Gesetz-Sammlung fuer die Koeniglichen Preussichen Staaten, 1902, Nos. 10386, 10387), is the first German application of an interesting phase of excess condemnation. There are also numerous special acts relating to particular German cities (Kissen, B. W. Report on Town Planning Enactments in Germany, 65-108). The charter of the city of Montreal, 1913, No. 421, gives the power of excess condemnation to the city and the law of Ontario grants the power to the city of Toronto (Stat. Ontario, ch. 119, No. 12).

A fairly complete examination of the subject of excess condemnation shows that California, Massachusetts, Michigan, New York, Ohio, Rhode Island, Virginia and Wisconsin have provided for that power in their state constitutions. Eleven states have passed statutes of a general or special nature. Of common-law jurisdictions other than the United States, the British Parliament, the Parliament of Ontario, the Charter of Montreal have provided for excess condemnation. Of civil law jurisdictions, France, Belgium and Germany have similar enactments. We submit that in view of this widespread legislative declaration both by constitution and statute, it is difficult to say that the purpose of all these enactments, distributed over a long period of time and a wide area, is arbitrary and violates due process of law.

With reference to the foreign examples of excess condemnation we wish to point out that, contrary to the idea of the Court of Appeals (Rec., p. 108), they are not cited as constitutional enactments in the American sense of the term "constitutional." They are presented that the Court may see that in many countries of the world governments have recognized a public problem involved in building, widening and improving public streets, and that they have regarded excess condemnation as a reasonable solution of that problem. When we are discussing the arbitrary character of a particular law providing for eminent domain it is certainly persuasive, to say the least, to find that other modern governments recognize such a law as a reasonable exercise of sovereignty. In fact the British examples are in point from a constitutional view. There has always been a "law of the land" in England. That is the source of our phrase "due process of law." We submit that it would be surprising to learn that England since 1845 had been acting contrary to the law of the land in its numerous applications of excess condemnation.

2. *The Actual Use of Excess Condemnation Indicates that it has been Considered a Reasonable Practice*

The actual use of the powers granted by these laws further indicates that excess condemnation has generally been regarded as a reasonable application of eminent domain. The city of New York has used its powers many times. Mr. Herbert S. Swan [1] reported to the Committee on Taxation of the city of New York in 1915 (p. 54) that the city had used the power in opening the following streets: Third, Fourth, Sixth, Thirteenth and Fourteenth, Seventh Avenue, Cedar Street, Lewis Street, Exchange Place and Lafayette Place. The area of excess lands varied from 9 to 71,480 square feet. All of these cases, however, were very early ones. A recent example is the extension of Sixth Avenue to provide an approach to the Hudson River vehicular tunnel.

The city of Rochester, N. Y., has made at least four street improvements by using excess condemnation.[2] Fig. 1 (page 27) shows the Devonshire Court Extension. Prior to improvement, Devonshire Court, Turner Street, Chili Terrace and Salina Street were dead-end streets in a moderately priced residential section. The property owner demanded an exorbitant price and proposed to subdivide in a manner not conforming to the City Plan. In 1921 Devonshire Court was extended to the east opening up the four dead-end streets and connecting them with Thurston Road. At the same time the adjacent land as indicated was taken by excess appropriation and was subdivided by the city. These lots have been sold by the city with the following result. The total cost of land was $17,224. Receipts from sales

[1] Excess Condemnation. A report of the Committee on Taxation of the city of New York, New York. 1915.

[2] For the Rochester cases here noted, see The Use of Excess Condemnation in the Opening, Widening and Extension of Streets, a paper read by A. L. Vedder before the City Planning Division of the American Society of Civil Engineers at New York City, January 22, 1925, published by the A. S. C. E. in 1925. Also reported in The American City, February, 1925, pp. 125-127.

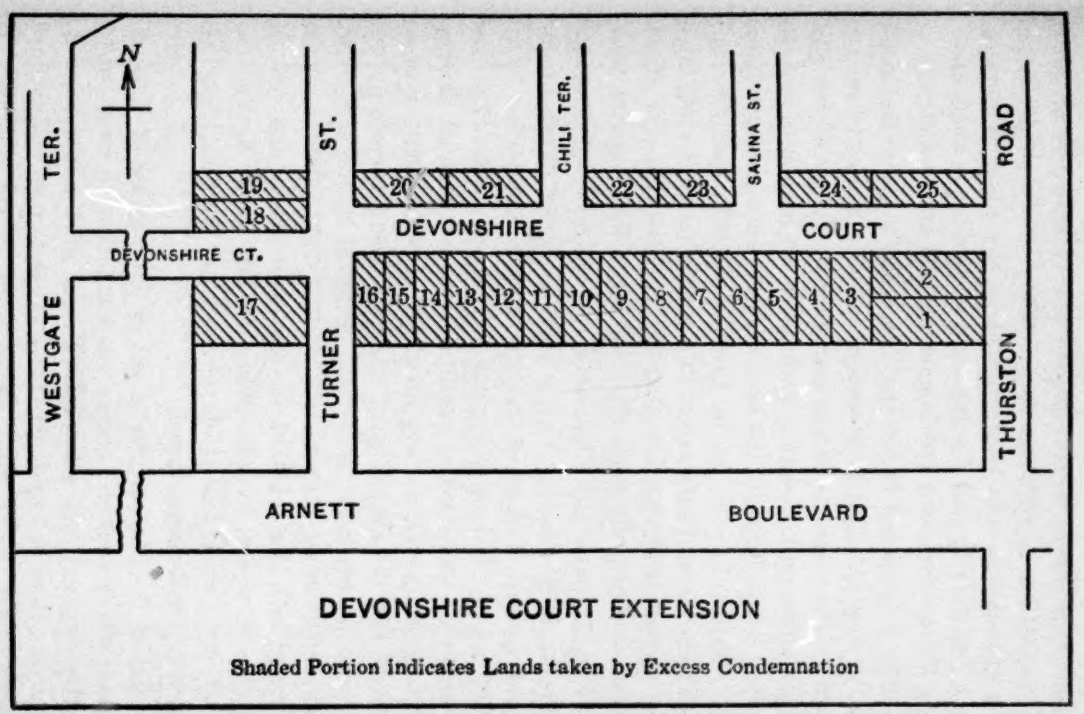

N
TER.
ST.
CHILI TER.
SALINA ST.
ROAD
19
18
20
21
22
23
24
25
DEVONSHIRE
COURT
DEVONSHIRE CT.
17
16 15 14 13 12 11 10 9 8 7 6 5 4 3
2
1
WESTGATE
TURNER
THURSTON
ARNETT
BOULEVARD
DEVONSHIRE COURT EXTENSION
Shaded Portion indicates Lands taken by Excess Condemnation

FIG. 1

27

amounted to $16,750 and the city still retains one lot valued at $2,000.00. In addition the property is now subdivided in an economical way conformable to the planned development of the city and the dead-end streets are opened, allowing a free economic development of the entire district.

Fig. 2 (page 29) shows the University Avenue Extension in Rochester. This is a case of street opening to connect two existing streets in the commercial section of the city. This offers an interesting example of lot remnants in a few cases, but in the main the plan accomplishes a consolidation of existing lots so as to furnish suitable and economic building sites. There are in this plan at least five lots taken by excess condemnation that do not abut the new street. There are only six cases that could be called remnant cases.

Fig. 3 (page 30) illustrates the widening of Elmwood Avenue in Rochester. This is almost a direct parallel to the cases at bar. The street was widened from 49½ feet to 100 feet, all of the land being taken from one side. The land remaining was deemed unsuitable for economical building sites and therefore every abutting lot was taken in its entirety. In the majority of cases the land remaining was larger in area than the portion occupied by the new street. On intersecting streets lots were taken (similar to the Vester lot) that abutted on the cross-street and did not touch Elmwood Avenue. Thus on Mt. Hope Avenue two such lots were taken; on Cedarwood Terrace, four; on Southview Avenue, three.

Under the Massachusetts act of 1904 (Acts of 1904, ch. 443), which confined excess condemnation to cases where "the remnant left after taking such part would from its size or shape be unsuitable for the erection of suitable and appropriate buildings," the Fulton Street widening in Springfield of 1914 is the most interesting example.* The

* See Cushman, Excess Condemnation, pp. 65-66.

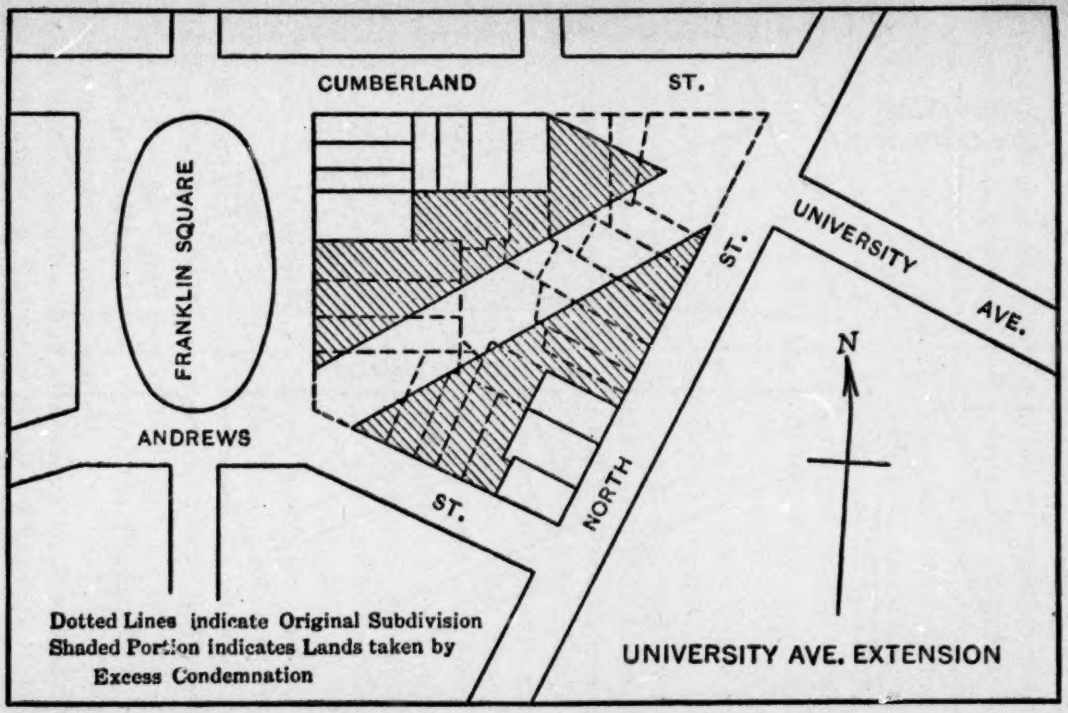

CUMBERLAND
ST.
FRANKLIN SQUARE
ANDREWS
ST.
NORTH
ST.
UNIVERSITY
AVE.
N
Dotted Lines indicate Original Subdivision
Shaded Portion indicates Lands taken by
Excess Condemnation
UNIVERSITY AVE. EXTENSION

Fig. 2

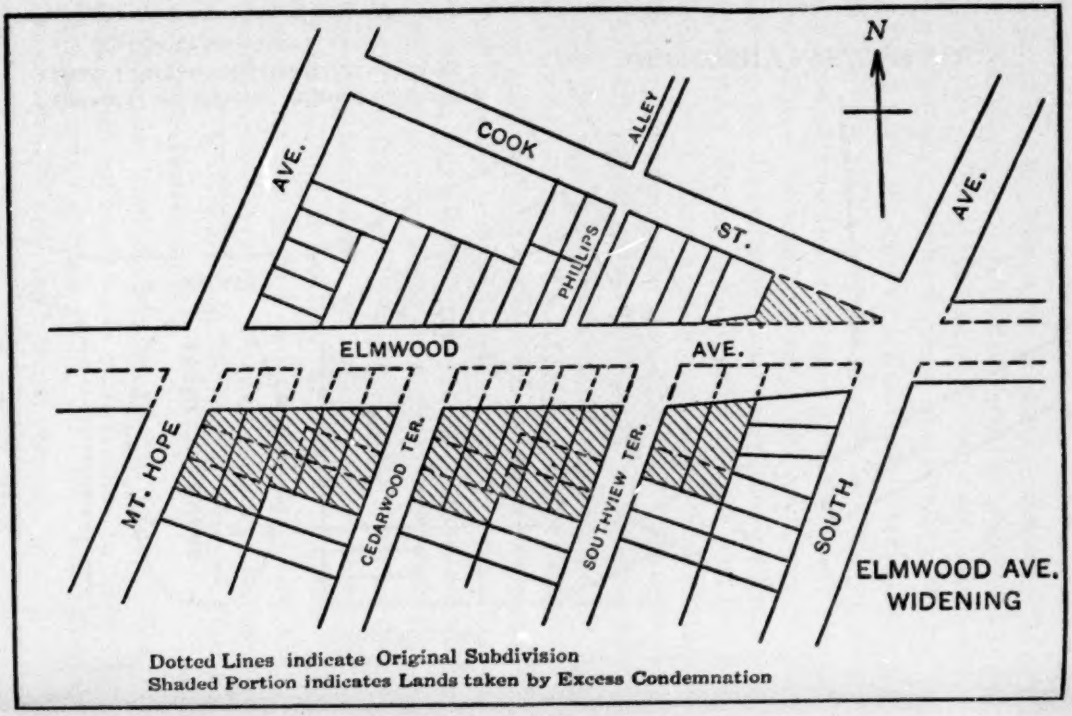

N
COOK
ALLEY
AVE.
ST.
AVE.
PHILLIPS
ELMWOOD
AVE.
MT. HOPE
CEDARWOOD TER.
SOUTHVIEW TER.
SOUTH
ELMWOOD AVE.
WIDENING
Dotted Lines indicate Original Subdivision
Shaded Portion indicates Lands taken by Excess Condemnation

Fig. 3

street was widened for five blocks from thirty-three to seventy-five feet on one side. Six excess parcels were taken by appropriation proceedings, the size of the parcels being as follows: Minard, 44 foot front, 21 foot depth, area 1,062 square feet; Conn. River R. R. Co., 41 foot front, 27 foot depth, area 1,112 square feet; Barrett, 41 foot front, 27 foot depth, area 1,134; King, 38 foot front, 22 foot depth, area 875 square feet; Dam, 106 foot front, 59 foot depth, area 6,334; Albert, 80 foot front, 25 foot depth, area 1,852 square feet. The size of some of these parcels would indicate that the Massachusetts courts were quite liberal in their construction as to what constituted a remnant.

The city of London has applied excess condemnation to a very great extent.[1] Between 1855 and 1913 it executed one hundred and three street proceedings in which excess property was appropriated. The Northumberland Avenue Improvement was one of these. The greatest project was the Kingsway Improvement from Holborn to the Strand. (Fig. 4, pages 33 and 34.) The total area taken was twenty-eight acres, of which twelve and one-quarter acres were actually occupied by the street and fifteen and three-quarters acres were taken as excess and used for building sites.

French experience centers largely around the development of boulevards by Baron Haussmann between 1852 and 1869. In that period excess condemnation was used in building fifty-six miles of streets. The Avenue de l'Opera was also built by this method in 1876.

Brussels and Liege have applied the Belgian Law in numerous municipal improvements.[2]

The city of Montreal has used excess condemnation in the extension of St. Lawrence Boulevard in which it condemned 102,002 square feet of which 52,744 square feet rep-

[1] See Report to Committee on Taxation, opp. cit. p. 28-33.
[2] See Mass. House Doc. 1906 (1904).

resented surplus property. In the Cartier Street opening 75,180 square feet of surplus land were appropriated. For Cartier Square 82,078 square feet of surplus were taken. The improvement of St. Joseph Boulevard involved the condemnation of 556,100 square feet surplus.[1]

We have sought to demonstrate that many governments have provided by law for excess condemnation and that in making public street improvements the method has been in use for some time both in this country and abroad. This, we submit, argues strongly that excess condemnation has become a part of the reasoned legislative expression of many states relative to their exercise of the power of eminent domain and that in meeting practical improvement problems excess condemnation has been considered and used as a solution. We come now to an analysis of the questions presented to the authorities when a street is to be widened or opened and the relation that excess condemnation bears to those problems.

3. Reasons for the Use of Excess Condemnation

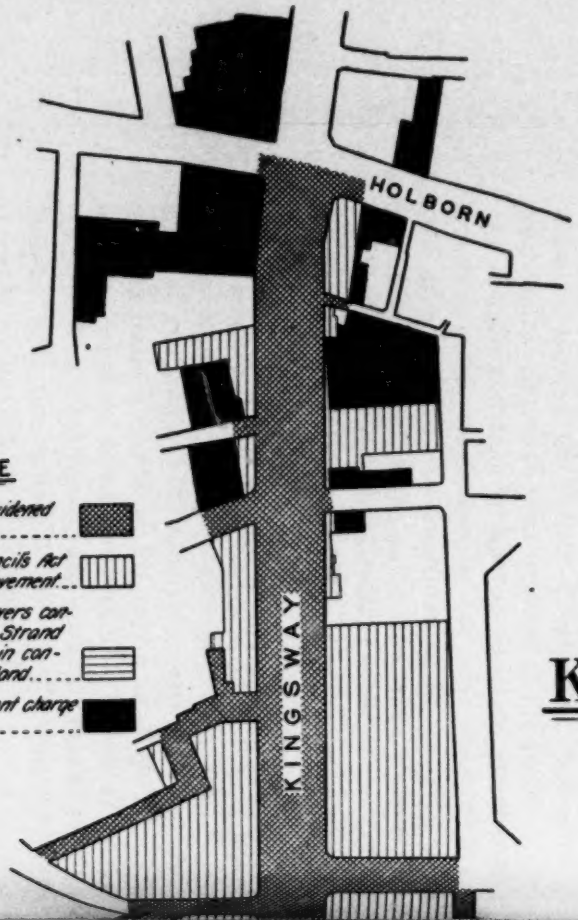
For many years the inadequacy of the ordinary powers of eminent domain has been generally recognized by students of the subject.[2] Fifteen years ago a committee on taxation made a report to the mayor of New York City upon the use of the excess condemnation powers granted by the New York Constitution and a statute passed pursuant thereto. This Committee, Alfred E. Marting, Chairman, reported on May 20, 1915, as follows:[3]

> "*Control of Land Adjacent to Improvements.* American cities have been hampered in effective city plan development and in creating dignified and artistic public places by the free and unrestricted use of abutting property by private owners. Many of our finest squares

[1] See Cushman, opp. cit. p. 143-145.

[2] For a complete discussion of the subject matter here summarized, see Chapters II, III, IV of Excess Condemnation, Robert E. Cushman.

[3] See Report of The Committee on Taxation, opp. cit.



EXPLANATORY NOTE

Property thrown into new and widened streets .....

Property acquired under the Councils Act of 1899, surplus of the improvement...

Property acquired under the powers conferred by the Clare Market Strand Scheme, 1895, and developed in conjunction with the surplus land.....

Property upon which a betterment charge was levied .....

PLAN OF KINGSWAY

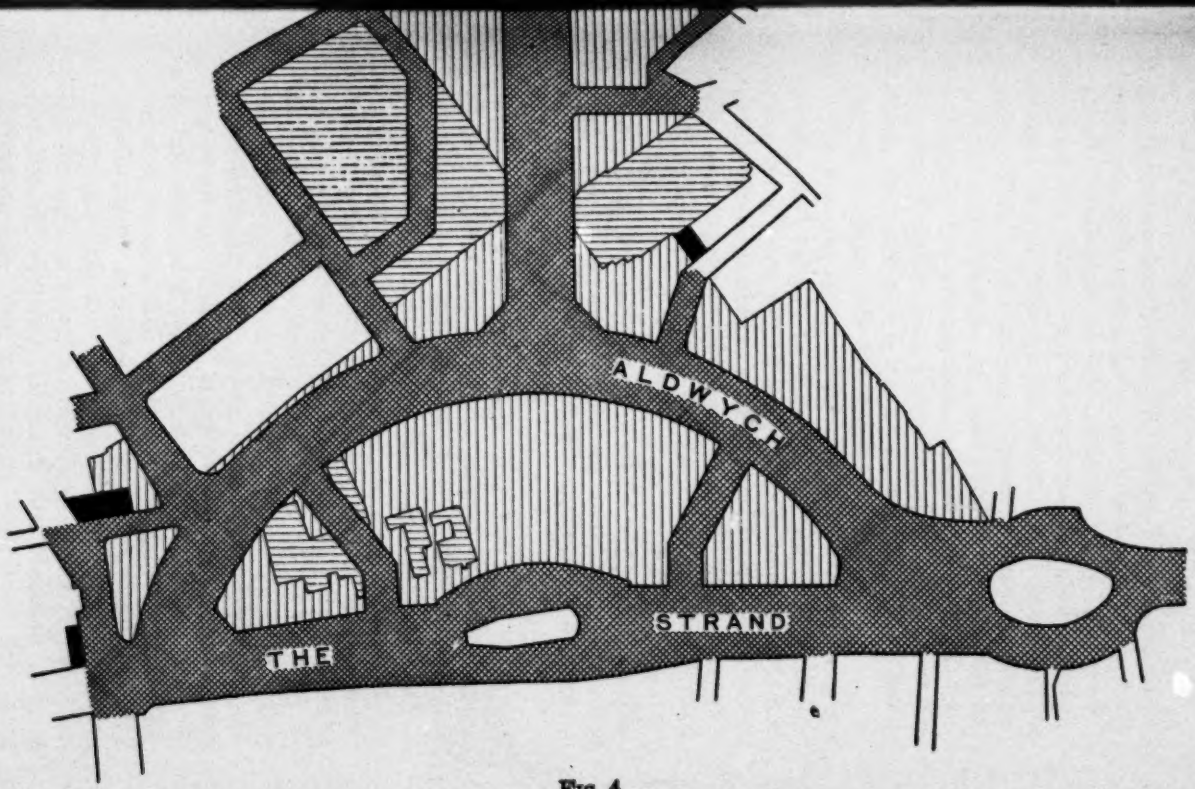


FIG. 4

and parkways are lined with stables, billboards, shops, factories, gas tanks, saloons. There is no orderly architectural arrangement. One and two-story buildings adjoin twelve and twenty-story structures. Residences, shops, stores, factories crowd one another close. This condition has decreased property values and the attractiveness of public places. It is to the advantage of the private owner as well as to that of the city that neighborhoods should not be allowed to run down, that our public places be surrounded by buildings in keeping with the improvement.

The city should have the power to sell or lease the excess land subject to suitable restrictions. If this is done, New York will be enabled to develop streets and public places comparable to those of Paris and Vienna. The convenience and enjoyment of the community should take precedence of the whim of the private owner.

We have but to look at our bridge approaches, our small parks, our public squares and places to realize that successful city planning requires the control of adjacent property.

Re-Plotting of Remnants and Irregular Building Plots. New York furnishes several 'horrible examples' in cutting new streets through sections already built up without excess condemnation. Delancey Street in Manhattan and Flatbush Avenue Extension in Brooklyn have both been held back in development and in the increased value which the improvement promised, by the small, irregular, odd-shaped building plots which were left. These are in many cases unsuited to proper building unless united with adjoining properties held by other owners. The public loses in tax value and sightliness and the private owner is injured because his lot is not available for suitable development. A glance at the maps accompanying this report, showing the lot lines after these streets were cut through, is proof conclusive of loss and waste under the old system. Although the Flatbush Avenue Extension has been practically completed for three

years and despite its strategic position, development has not begun. The street still looks, to borrow an expression of Lawson Purdy's, 'as if it had been devastated by an earthquake.' European nations long ago met this situation and have empowered local governments to relocate and replot such areas. Excess condemnation would leave the city free to rearrange and subdivide the land fronting the improvement into plots of the size and shape best suited to the proposed development.

Saving of Expense to the City Through Sale of Abutting Property at Increased Values Due to the Improvements. While the necessity for excess condemnation rests mainly upon the control of adjacent land and the replotting of remnants, a substantial saving of dollars and cents will result in many instances. It must not be assumed that excess condemnation will in every case bring revenue to the city or reduce the cost of public improvement. Sometimes excess condemnation is justified for social purposes alone, but often financial gain to the city will also result. It is equitable that the increased value which arises solely from the enterprise of the community in constructing a boulevard or a park or public square should go to the city and not to those who are fortunate enough to own property in the path of the improvement. If the cost of public improvements is reduced the city will be better able to continue its efforts for a rational and convenient city plan without too great a financial burden.

We can learn much from Livingston Street, in Brooklyn. In 1905 this street was widened from 50 to 80 feet by taking 30 feet from the southerly side. Livingston Street runs parallel to Fulton Street, and the purpose was to relieve the overcrowded condition of Fulton Street. The land to a depth of 100 feet on the southerly side of Livingston Street, together with the improvements, was assessed at $1,268,700. The awards made for taking 30 feet from the front amounted to $1,989,890, or about 57 per cent in excess of the as-

sessed valuation of the entire property. In many instances the buildings were easily adapted to the new conditions, new fronts were built, and as a result of the improvement the rental and fee value was largely increased. In 1911, six years after the widening, the assessed valuation of the remaining land, though but 70 feet in depth, had increased 219 per cent over the assessed valuation of the land 100 feet in depth in 1905. One-quarter of the cost of the widening of the street was at first assessed upon the local property owners. The area of assessment was so large that a considerable portion of the cost was to be paid by owners of property not directly benefited. But through an act of the legislature the assessment was canceled and the cost of the entire proceeding was paid by the city by the issuance of bonds.

Where the city is compelled to take a considerable portion of a lot or building it has to pay practically the cost of the entire parcel and would do better to acquire the fee of the whole plot and secure the benefit from the increased value of the remainder.

The experience of London in financing street improvements by excess condemnation should be a valuable help to us. From 1889 to 1913 the London County Council used excess condemnation in forty-five street proceedings, the gross cost of which was $44,246,125.

Without excess condemnation extensive replanning and reconstruction in the older parts of London could not have been carried out. While revenue is not the principal reason for excess condemnation it is a strong incidental consideration."

In 1904 a Committee of the Massachusetts Legislature reported on Excess Condemnation as follows:*

"The Committee presents the following conclusions: It has clearly appeared, from the evidence submitted to us, that the present system of laying out new streets or widening or altering existing ones, under which

* Massachusetts House Doc. 1904, No. 288, p. 4-6.

only the land actually required for the street is taken, is, especially in those parts of cities which are covered with existing buildings, productive of serious public disadvantages; and a brief consideration of the matter is sufficient to show that this difficulty is inherent in the system itself, and must persist unless some modification of that system can be devised.

The land abutting on any existing street is divided and arranged in lots, which, as well as the circumstances have admitted, are adapted to the street in its present condition, and the buildings thereon are constructed in conformity therewith. Any widening of the street not only destroys the existing buildings, but, by reducing the size of the abutting lots, leaves the residues or remnants of many of them of such shape and size as to be entirely unsuited for the erection of proper buildings, unless and until these remnants have been united with the adjoining properties, generally with those in the rear, which are thus enabled to extend out to the new street lines.

The same condition is found, and frequently even to a greater extent, when a new thoroughfare is laid out through existing blocks covered with buildings.

Hence, when an existing street is widened or a new thoroughfare is laid out under the present system, the lots on one or both sides of the new or widened street are left in such condition that, until a rearrangement can be made, no suitable buildings can be erected thereon, and the public benefit to be derived from the improvement is in great measure lost.

The street may be valuable as a thoroughfare or as one for through traffic, but not for either business or residence purposes; and striking instances of this have been presented to the committee in connection with street improvements in the city of Boston.

Not only is such a situation a great disadvantage to the city, in hindering and sometimes preventing its proper development, but it will easily be seen that this state of affairs renders the collection of betterment assessments extremely difficult, since the benefit to the

surrounding property which should accrue from the improvement is actually not received until these residues or remnants have been united with the adjoining lots,—a process which, under the present system, may take years.

It often happens that the owners of these remnants, desirous of deriving some income therefrom in the meanwhile, erect thereon temporary structures, unsuited for proper habitation or occupancy; and such structures are too frequently made intentionally objectionable, both in appearance and in the character of their occupancy, for the purpose of compelling the purchase of such remnants at exorbitant prices; with the result that a new thoroughfare, which should be an ornament to the city, is frequently for a long period after its construction disfigured by unsightly and unwholesome structures, to the positive detriment of the public interests. These results, which seem inevitable under the present system, may operate to prevent the undertaking of much-needed street improvements. These matters are forcibly presented in the testimony of Mr. Charles, chairman of the Board of Street Commissioners of Boston, and of his associate commissioners Mr. Duane and Mr. Gallivan, to which testimony especial attention is directed.

Furthermore, it is believed that the taking of whole estates, instead of taking the greater part and leaving an undesirable remnant, would not materially increase the initial expense of the undertaking; inasmuch as a city which takes, under the present system, so much of an estate as to leave the remainder unsuited for building purposes, is often obliged to pay for the value of the part taken, and for the damages to the remaining part practically as much as it would be obliged to pay for the whole estate.

What has been said above indicates the public considerations which render a change in the existing system desirable.

There is also, however, another side to the question, viz., that of the private owner, the consideration of

which appears to point to the same conclusion. It frequently happens that an owner, the greater part of whose estate is necessarily taken for a public work, would prefer not to be left with the remnant on his hands, and, if an opportunity were offered, would voluntarily request the city to take the whole estate. Many people recognize that there is less opportunity for differences of opinion upon the question of the market value of a whole estate than over the more complicated question of the value of the portion which has been taken, and the damages to the remainder by reason of such taking; and hence a system under which the city could acquire the whole estate would be productive of greater ease in the settlement of damages, and less likelihood of litigation over the question involved therein.

This right of the private owner to require the taking of the whole estate, when the residue, after deducting what is actually needed for the public work, is unsuited for the erection of appropriate buildings or is reduced below a certain area, is almost universally recognized both in England and on the continent of Europe. It has also received recognition in this state, in chapter 159 in the Acts of 1867, relating to the widening of Oliver Street in the city of Boston, which act, after empowering the city to assess the cost of the improvement upon the abutting estates, provided that any owner, part of whose land was taken, might before the assessment elect to surrender his whole estate to the city, which should pay therefor its full value as it was before the improvement was made, and should have the right to resell the portion not required for the new street."

In 1918 the Chicago Bureau of Public Efficiency arrived at a similar conclusion after an examination of recent street widening projects in Chicago.*

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* Excess Condemnation. Report prepared by the Chicago Bureau of Public Efficiency. Chicago, Sept. 1918.

These reports present the practical considerations that have led to the enactment of excess condemnation laws and to the practice of excess condemnation in actual street improvements. We submit that these considerations demonstrate that the Ohio constitutional provision is a soundly reasoned enactment, in line with a widespread trend of law both in this country and abroad; that in actual practice excess condemnation has been considered a reasonable method of meeting problems arising out of street widenings; and that the practice is based upon sound reasons in furtherance of the public good. The law cannot, therefore, be said to provide for an arbitrary act of confiscation of private property.

We submit further that the project of the city of Cincinnati is consonant with the general practice of excess condemnation. An examination of the whole plan (Bk. Ex. Pff. 1) shows that from Main Street to Pike Street the new street will destroy twenty-five feet of the front of every building. This practically destroys these structures and the city would doubtless be compelled under the Ohio Law (Ohio Genl. Code Sec. 3688) to pay the total value of the structure. There will remain lots of land unsuitable to economical development in that neighborhood so long as they remain in separate ownership. This condition is particularly true in the section from Broadway to Pike Street where the existing ownership is more diverse, the individual lot frontage on Fifth Street smaller, and the proportionate destruction of buildings is greater. Considered as a whole municipal project in the light of the purposes of excess condemnation, we submit that the present project is a reasonable application of the powers of excess condemnation.

E. The Reasonableness of State Action in Exercising Eminent Domain is of Necessity a Matter of Historical Development and Local Needs

In the centuries when a road was merely a public right to travel over private property and when public buildings were the private property of the monarch, eminent domain meant little or nothing. When increasing travel required highways to be paved and maintained, and when public buildings became the property of the public rather than of the monarch, eminent domain began. When toll roads, toll bridges, railways, telephones and other public utilities came, the necessities of the case required the extension of the right of eminent domain even to these privately owned corporations on the theory that they obviously existed to supply a public purpose.

If the economic subsistence of a community depends on a particular business or industry, that business or industry is a vital public utility. Thus we have our federal government interfering by means of protective tariffs on behalf of infant and full grown private industries, and our federal and state governments maintaining departments for the benefit of private agriculture, mining, lumbering, tourist hotels, etc.

The real test in the extension of the application of eminent domain to any private interest is not whether the business or industry affected is public but rather whether the public advantage justifies the exercise. Farms on which the country's food is produced are very necessary utilities but there would ordinarily be no public advantage in giving to farmers rights of eminent domain. In arid areas, however, private farms not connected with irrigation systems cannot function for their owners or for the public if they are not permitted to condemn easements for private irrigation ditches. Therefore the public authority permits the private appropriation.

F. Supreme Court Decisions

In the early nineteenth century, most states authorized manufacturers operating by water power to flood private property for their mills on paying damages. The leading federal case was *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9. In that case, the Court said, at page 26, that the New Hampshire statute authorizing such flooding

> "is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which, without some such regulation could not be beneficially used."

and further

> "Being a constitutional exercise of legislative power and providing a suitable remedy, by trial in the regular course of justice to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States." *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hartado* v. *California*, 110 U. S. 516; *Hagar* v. *reclamation District*, 111 U. S. 701.

In the case of *Clark* v. *Nash*, 198 U. S. 361, the land of Clark lay between the land of Nash and a river. Acting under a Utah statute, Nash sought to condemn a right of way over Clark's land for the purpose of bringing water from the river. Clark claimed that the condemnation was for a private use. In considering the validity of the statute the Court (p. 368) discussed the reasons that would sup-

port such an enactment and concluded that under the circumstances, it was valid, saying, at page 369:

> "This Court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its Courts, must in the nature of things be more familiar with such facts and with the necessity and occasion for the irrigation of the lands than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state Courts."

In *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, the Mining Company, acting under a statute of the State of Utah, sought to condemn a right of way over the land of Strickley. The purpose of the right of way was to allow the construction of an aerial bucket line from the mine to a railroad so that ore might be loaded upon freight cars. Strickley claimed that the right of way was for the private use of the Mining Company and violated the Fourteenth Amendment. The Court held (Syl.):

> "There is nothing in the Fourteenth Amendment which prevents a state in carrying out its declared public policy from requiring individuals to make to each other, on due compensation, such concessions as the public welfare demands; and the statute of Utah providing that eminent domain may be exercised for railways and other means to facilitate the working of mines is not unconstitutional." *Clark* v. *Nash*, 198 U. S. 361 followed.

At page 531, the Court held:

> "In discussing what constitutes a public use it (*Clark* v. *Nash*) recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that

there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment which prevents a State from requiring such concessions. If the state constitution restricts the legislature within narrower bounds that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

In the case of *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, the railway company sought to condemn land belonging to Hairston for the purpose of building a spur track to a tobacco factory. Hairston claimed that the use was not a public one and violated the Fourteenth Amendment because the spur was to serve merely a private factory. The Court held that the use was public.

In the case of *Attorney General* v. *Williams*, 174 Mass. 476 (affirmed on other grounds by this Court in 188 U. S. 491), the question involved was the validity of a statute which prohibited the erection of a building more than one hundred feet in height on Copley Square in Boston while providing at the same time for compensation to owners injured in their property rights by the limitations created. The statute was sustained as authorizing an appropriation for the public use within the limitations of the Massachusetts Constitution.

In the case of *Old Dominion Land Company* v. *U. S.*, 296 F. 20 (C. C. A. 4, 1924), a direct case of recoupment by the federal government was before the court. The government had, in 1918, leased plaintiff's land for the period terminating July 30, 1922, with a proviso that the government should have thirty days after the expiration of the lease to remove any buildings it might erect thereon. The government erected on the property warehouses valued at $1,522,000 but with the termination of the war, the land and buildings had ceased to be used or needed for government purposes. The government apparently slept on its lease, and did not wake up until the lease period was almost at its end. To save its investment, it sought to negotiate a renewal of the lease or a purchase of the land. The owning company in the apparent belief that it was about to become, by due process of law, the owner of valuable improvements without cost to itself on the termination of the lease, refused to negotiate on any reasonable basis. The government was not using the property and did not contemplate any use of it. In fact, two days before the expiration of the lease, it leased its own rights to a private individual for six months, revocable at will. Nevertheless on the very day before expiration, it instituted condemnation proceedings. The owning company sought to prevent condemnation on the ground that no public use was in contemplation and that the appropriation was for financial gain only, to-wit, to save the building investment.

The Circuit Court of Appeals in that case said at page 22 of their opinion:

> "Even, however, if the Congress had expressed the intention to dispose of the warehouses and land, we think the condemnation would, nevertheless, have been for a public purpose and use. The term 'public use' cannot be limited by inflexible definition."

and further, on the same page,

> "Since the price of the land could not be agreed on, the only method of preventing an immense unearned gain to the land-owner was the condemnation of the land. To hold such a condemnation not to be for a public use would be to give away immense public treasure by a narrow and technical limitation of the meaning of 'public use.' "

The Supreme Court affirmed the decision of the Court of Appeals in *Old Dominion Land Co.* v. *U. S.*, 269 U. S. 55. On page 66, the Court say:

> "Congress has declared the purpose to be a public use, by implication if not by express words * * *. Its decision is entitled to deference until it is shown to involve an impossibility."

In each of the cases cited above the Court has approached the question of public use as one to be determined by the reasonable character of the purpose and means. In the Head case it was found reasonable to allow one man's land to be flooded by another in order to further a manufacturing process. In the Clark case the Court held that the State of Utah was not going beyond the bounds of reason in allowing Nash to use Clark's land in order that he might irrigate his own fields. The same principle runs through the Strickley case, the Hairston case and the Williams case. The Old Dominion case seems to go even farther and to hold that the action of a legislative body is to be sustained unless it can be said that it involves an impossibility.

We submit that under these authorities the provisions of the Ohio Constitution constitute a perfectly reasonable exercise of the right of eminent domain and cannot be said to be an act of arbitrary confiscation going beyond the pale of a legal enactment of government.

In fact, even if public use were to be accepted as the test of due process of law, these decisions justify excess condemnation as an exercise of eminent domain. The purpose of excess condemnation "is not a private benefit as it was in the case above cited of a ditch for irrigation or a railway to a mine," but it is public in every aspect. See *Noble State Bank* v. *Haskell*, 111 supra.

G. Analogy of Cases Under the Police Power and the Power of Taxation

We have seen that eminent domain is one of the sovereign powers of a state subject to the constitutional limitation of due process of law. It is very similar in this respect to the police power of the state and to the power of taxation. The outstanding distinction is that eminent domain gives particular compensation to the individual while the other powers do not.

In discussing the constitutional limitations upon eminent domain it will be helpful to discuss briefly this Court's views on analogous cases within the realm of the police power and the power of taxation.

The rule as to the limitation of due process of law upon the state's police power is too well established to require extended discussion. This Court will not set aside a state statute exercising the police power unless the law is clearly arbitrary and unreasonable. In *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584, it was said:

> "We need not labor the point, long settled, that where the legislation is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision."

We shall therefore merely suggest cases under the police power which seem to throw light upon the present exercise of eminent domain.

Zoning Cases. In the recent cases of *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, and *Gorieb* v. *Fox*, 274 U. S. 603, this Court sustained the right of municipalities to enforce compulsory zoning systems and street setback lines unless the ordinances were clearly arbitrary and unreasonable.

In the Gorieb case, the Court conclude their opinion by saying:

> "Since upon consideration we are unable to say that the ordinance under review is 'clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals, or general welfare,' we are bound to sustain it as constitutional. *Euclid* v. *Ambler Co.*, supra, p. 395."

These zoning ordinances unquestionably deprive an owner of property rights. For the public welfare, they restrain him from making certain uses of his property which prior to the enactment of the ordinance he was able to make without question. However, even where the zoning results in loss in land value, the Court will not interfere with a reasonable zoning system.

In a very real sense the ordinary excess condemnation undertaking is a zoning enterprise on an equitable basis. The city cannot very well compel the owners of mutilated buildings to tear them down and erect suitable ones. Nor can it compel the owners of remnant lots to aggregate them and resubdivide them in harmony with the improvement. To make possible the achievement of these ends, the city compensates the owners for their remnants, aggregates them, resubdivides them and *sells them with restrictions which are suitable to the zone created by the improvement.*

Noble State Bank v. *Haskell*, 219 U. S. 104. Here a state statute requiring state banks to pay one per cent of their

average daily deposits to a Depositors Guaranty Fund for the benefit of all depositors in the state banks was sustained under the due process clause.

Rent Law Cases. Block v. *Hirsh,* 256 U. S. 135 and *Marcus Brown* v. *Feldman,* 256 U. S. 170. These cases sustained laws requiring reasonable rents and denying the right to repossess except on certain grounds.

Welch v. *Swasey,* 214 U. S. 91, sustained a law limiting the right to erect buildings of more than a specified height.

These cases illustrate that under the police power property may be taken and due process of law is not violated if the state's act is not clearly an arbitrary and unreasonable exercise of power.

The sovereign power of taxation is likewise subject to the limitation of due process of law. In *Jones* v. *Portland,* 245 U. S. 217, 221, the rule of limitation is stated as follows:

> "It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the power of the state."

In that case an ordinance of Portland, Maine, providing that moneys raised from taxation should be used to establish and maintain a yard for the sale of coal, wood and fuel without profit was sustained as not taking a taxpayer's property for uses which were private.

In *Green* v. *Frazier,* 253 U. S. 233, it was claimed that a statute engaging the state in the business of manufacturing and marketing farm products and using the power of taxation for such purpose violated due process of law. The Court held that the due process clause contained no specific limitation upon the taxing power but "it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes," (p. 238). "With the wisdom of such legislation,

and the soundness of the economic policy involved we are not concerned. Whether it will result in ultimate good or harm is not within our province to inquire," (p. 240). The Court decided that since the highest Court, the people of the state with the sanction of the constitution and its legislature had decided to enter upon such an enterprise, in view of local conditions, "we are not prepared to say that it is within the authority of this Court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision." (p. 243.)

These cases have been followed and their doctrine applied by various lower federal courts. In *Mutual Oil Co.* v. *Zehrung*, 11 F. 2nd. 887, the charter of Lincoln, Nebraska, empowering the city to engage in the business of selling gasoline and oil was held not to violate the Fourteenth Amendment. In *Gallardo* v. *Porto Rico Ry. Light and Power Co.*, 18 F. 2nd. 918, the First Circuit Court of Appeals held that the Porto Rico Water Power Act levying a tax to allow the territory to sell water and electric power was a valid exercise of power and not for a private purpose. It was further held that the possibility of profit to the public treasury did not alter the case. The Eighth Circuit Court of Appeals in *Goodman* v. *School District of Denver*, 32 F. 2nd. 586, held that operation of a restaurant by a school district, using tax funds, was not a violation of due process of law.

These cases under the police power and the power of taxation, both, like eminent domain, subject to the limitation of due process of law, illustrate the attitude of federal Courts toward such powers when challenged under the due process of law clause of the Fourteenth Amendment. We submit that the same principles should control in considering the effect of the Fourteenth Amendment upon a state's exercise of eminent domain.

H. Unequal Protection of the Laws

In addition to their claim on the ground of due process of law, plaintiffs have alleged, in their petitions, that the application of the excess condemnation ordinance in these cases deprives them of the equal protection of the law. Their claim is that they are discriminated against by reason of the fact that the city did not appropriate the excess in the case of the Masonic Temple property and the Fontbonne property, and that it did not appropriate any property on the north side of Fifth Street.

The claim of unequal protection of the laws has not been seriously argued by plaintiff nor considered by either of the courts below. The Circuit Court of Appeals made no reference to the point in their opinion. The district judge referred to it as follows (R. p. 33):

> "If the city be justified in condemning property, it may make selection of that property which it will condemn, and the fact that certain property is not condemned as on the north side of the street, will not affect the validity of the condemnation of other property, as upon the south side of the street, for the very reason that there is no obligation not to condemn. That resting in the discretion of the city, these particular plaintiffs are deprived of no rights which they hold as of right, assuming the condemnation to be valid. The condemnation may be invalid under the Fourteenth Amendment but not because, in the attempt to exercise the right to appropriate, the city has considered it necessary to take the property of one but not of another."

We believe that this disposes of the claim. For further authority, however, the Court is referred to the following:

20 C. J. 624.
Sears v. *Akron*, 246 U. S. 242, 251.
Shoemaker v. *U. S.*, 147 U. S. 282.

U. S. v. *Gettysburg Elec. Ry. Co.*, 160 U. S. 668.
Boom Co. v. *Patterson*, 98 U. S. 403, 406.
Adirondack Ry. Co. v. *New York*, 176 U. S. 335, 349.
Southern Railway Co. v. *Memphis*, 126 Tenn. 267.

A glance at the appropriation plat (Pff. Ex. 1, Bk. of Exs.) will show that the city followed a reasonable plan. Reference has heretofore been made to the exceptions on the south side (pp. 5, 6). As to the claim that the north side of Fifth Street should have been taken, the answer is that the council was not obliged to do so and apparently considered it unwise. It might be said, furthermore, that inasmuch as the widening is on the south side of Fifth Street, the right to appropriate excess property on the north side is subject to question.

I. The Opinions of the Lower Courts

The reasoning of both lower courts in arriving at their conclusion is simple though not convincing. Analyzed, it reduces itself to the following:

Premise 1. The sole purpose of the city of Cincinnati in applying excess condemnation to the Fifth Street improvement is to recoup out of increased values a part of the expense of the improvement. (R. pp. 28-29; p. 106.)

Premise 2. Recoupment for the benefit of the public is not a public use. (R. p. 31; p. 107.)

Conclusion. Therefore the appropriation is a taking of property without due process of law.

Counsel believe that both the premises on which the conclusion rests are unsound.

1. Recoupment not the Sole Purpose of the City

The assumption that financial recoupment is the sole purpose of the city in these appropriations is unsupported. Council's resolution of intent merely states generally that

the excess appropriation "is in furtherance of the said widening of Fifth Street and is necessary for the complete enjoyment and preservation of said public use." (R. p. 7.) The appropriating ordinance appropriates the excess "in furtherance of the public use set forth in Section 1 (to-wit, "street purposes for the widening of Fifth Street"), and for the more complete enjoyment and preservation of the benefits to accrue from said public use." (R. p. 89.)

The foregoing is practically all the evidence which directly shows the purpose of the city. If recourse is had to the pleadings, the Court will find the city's position stated respectively as to each of the three tracts on pages 8-10, 46-48 and 62-64 of the record. In each case, the answer of the city summarizes its claims as follows (R. 10, 45, 64):

> 1st. That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets, by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage.
>
> 2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effectuating the improvement.

Obviously an impersonality such as a city cannot very well testify as to what its plans and hopes are, but any Court ought to take judicial notice of at least two things in the situation presented, to-wit:

> (a) That placing in the hands of the city the elimination of the old buildings to be mutilated by the street widening is a desirable object. (That the city council had this in mind is shown by the fact that they permitted two fine large buildings to stand because they had been constructed to conform to the proposed improvement.)

(b) That the immediate aggregation of small parcels and parcels of irregular shape is a desirable object in the laying out of property along a newly widened highway.

When the improvement is completed, council will doubtless be in a position to determine what size tracts and what kinds of restrictions will be best suited for the harmonious development of the south side of Fifth Street. The Ohio Constitution contemplates that the city "may sell such excess with such restrictions as shall be appropriate to preserve the improvement made." It must be presumed that the city will proceed in a constitutional manner if it sells the excess. In so far as it can do so in advance of an actual determination to sell, the city has indicated that its purpose is to provide for such restrictions on possible resale as may be appropriate. In its resolution declaring its intention to appropriate, the city declared (Defts. Ex. A, Rec. p. 87), that the excess was taken "in furtherance of the said widening of Fifth Street . . . and is necessary for the complete enjoyment and preservation of said public use."

The city may never resell the excess. It is not compelled to do so by the constitution. That is a question to be determined in the future. Recoupment can come only from a sale and we submit that until the city by some act evidences an intent to sell, it cannot be said to be proceeding only on a theory of recoupment. The city has declared that it takes the excess to "preserve the said public use" and that is exactly what the Ohio Constitution empowers it to do. It may preserve the public use in many ways; sale with restrictions is one that may be chosen in the future. But we are not warranted upon such a record in discarding every possible use in favor of a use by sale that may, among other things, result in a possible recoupment, and then

going a step farther and concluding that recoupment is the only purpose of the appropriation.

In view of the foregoing, it appears to counsel for the city of Cincinnati that the courts below erred in assuming that the sole purpose of the city of Cincinnati was financial recoupment.

2. Recoupment for the Benefit of the Public is a Public Use

The self-contradictory Premise 2, set forth under heading I, is, of course, not so baldly stated in the opinions, but it is a necessary basis, in all its baldness, for the conclusion the courts arrived at. Both courts realized the contradiction and attempted to escape it. The District Court opinion says (R. p. 31):

> "The court feels that, at least a public use must be a use of the property for the benefit of the public, a use of the property for some period, short or long, a use of the property as property for the benefit of the public."

Counsel submit that the foregoing makes clear that the Court recognizes and seeks to evade the fact that even on the recoupment basis, the purpose of the appropriation is the public benefit.

The Circuit Court of Appeals say (R. p. 107):

> "Public benefit has been spoken of by some of the courts as a public use, but properly so only with respect to the case at hand, and where the public interest is so paramount as to require the subject matter for a public use. None of the cases relied upon by the city, some of which are cited in the margin, by analogy or otherwise, holds that such a use as the city proposes to make of these properties is a public use. In none of them has the use been found to be of a public character

> because of financial benefits to the condemnor or taker, as such, but it uniformly has been made to depend upon a use so dominently and directly related to the public as to be indispensable to its welfare."

As in the case of the District Court opinion, the foregoing is an attempt to narrow the application of "public benefit" as a test of "public use."

In this connection, counsel submit that the case of *Old Dominion Land Co.* v. *U. S.* (296 F. 20 and 269 U. S. 55) is a direct authority to the effect that the financial gain of the public is a proper public use. That decision can be justified on no other basis, unless one is to close one's eyes to the obvious facts.

The District Court plainly regarded recoupment as a reasonable purpose to be attained by eminent domain under certain circumstances. In the opinion the Court holds (Rec. p. 30), that where a condemnation cuts through a building and destroys it so that the value of the building exceeds the value of the excess land upon which it stood:

> "In such cases the improvement upon the property appropriated being practically destroyed it would seem that the city should be given the privilege of taking such property in its entirety and of availing itself of any value in the real estate that might remain by way of recouping some of the damage sustained or some of the compensation required through the destruction of such improvement."

This seems to justify the taking of remnants for the purpose of recoupment while at the same time denying the propriety of recoupment. We submit that this will not stand the test of logic. If recoupment is reasonable in the case of a remnant, every consideration that leads to such a conclusion will apply to a situation where the excess property is more than a remnant. The difference is entirely one of degree, not kind.

There is nothing unreasonable *per se* in the idea that the public should seek to regain a portion of the expense of an improvement through the resale of the excess land. Certainly no private interest is served by such a proceeding. If the excess is resold the increment of value created by the city by reason of the improvement goes into the public treasury. Thereby the financial burden upon all taxpayers is reduced and the net cost of the improvement is decreased. We are unable to see wherein any private interest or individual can profit from such a result. Nor can we see where the property owner suffers financial loss. He is paid the full value of that which is taken from him. This includes the value of land including any advantage of location or particular use, as well as the value of structures. It may not include the possible increment of value due to the improvement the city makes. This is because at the time the land is taken this increment does not exist; in fact it may never exist. It should also be pointed out that this increment is created solely by the public and therefore it is not unreasonable or unjust that it should inure to the public advantage. As a matter of fact if there be any private gain in this entire situation it arises from the landowner receiving this increment of value from an improvement paid for and created by the public at large, not from the public receiving the financial benefit of value which it creates.

3. The City is Acting Under the Ohio Constitution

There is a labored effort on the part of the District Court and the Court of Appeals to hold the instant application of excess condemnation unconstitutional without setting aside the provisions of Art. XVIII, Sec. 10, of the Ohio Constitution. This led the District Court to indicate what it thought the constitution meant by excess condemnation. It suggested (Rec. pp. 26-27) that Sec. 3677-12 of

the General Code of Ohio (providing for excess condemnation in connection with the approach to public buildings), was passed with reference to the constitutional provision and offered an example of the constitutional use of excess condemnation. Unfortunately for this view, Sec. 3677-12 was passed in 1904 (97 O. L. 333), and its constitutionality was never questioned. The constitutional amendment was adopted by the people in 1912. The Court of Appeals stated, "We do not hold that the provisions of the state constitution might not be validly enforced in a proper case" (Rec. p. 108), but counsel submit that no type of excess condemnation can be stated that is not fairly tested in the three cases at bar. We are unable to understand the Court's suggestion that the constitutional provision of Ohio means a condemnation of excess land in furtherance of the "use and preservation of the street for the purposes of travel" (Rec. p. 108). Such an interpretation, we submit, renders the provision either meaningless or useless. The Court referred to a condemnation of extra land necessary for lateral support (Rec. p. 107). But as the District Court pointed out (Rec. p. 27), this power the municipality always had and no constitutional provision was needed for its exercise. See *Dodson* v. *Cincinnati,* 34 O. S. 276, decided in 1877.

The Court further suggests (Rec. p. 107), that the constitution may provide for an excess taking of a remnant of land remaining in a lot after improvement. We submit that the Ohio Constitution neither expressly nor impliedly contains such a restriction and that the distinction between the condemnation of remnants and the broad powers granted in the constitution was too well known in 1912 for the framers of the constitution to mean by their language merely the appropriation of remnants.

We submit that a study of the Ohio constitutional provision together with those of other states providing for ex-

cess condemnation demonstrates that the application made by the city is that contemplated by the constitution. To attempt to sustain the constitution and condemn the appropriation made by the city in these cases would be, we submit, mere verbal legerdemain, preserving the letter while destroying the substance.

4. Authorities Relied on by the Lower Courts

Neither of the lower courts in its opinion, cited a single case in which a federal court has set aside a state enactment authorizing the appropriation of private property. The District Court, in its citations, limited itself to attempting to distinguish the cases of *Clark* v. *Nash*, *Strickley* v. *Mining Company*, and *Old Dominion Land Co.* v. *U. S.*, which have all been referred to above, and which, so far as they go, are in harmony with the position of the city.

The Circuit Court of Appeals in its opinion cited ten cases in all. Two of these (R. p. 105), are Ohio Supreme Court cases on the question of injunction as a proper remedy. The cases of *Hairston* v. *Railway*, 208 U. S. 598; *Lime Co.* v. *Railway Co.*, 223 U. S. 211, and *Jones* v. *Portland*, 245 U. S. 217, are referred to as showing that "great deference should be paid to the decisions of the courts of a state in determining what is a public improvement." The case of *Irrigation Co.* v. *Bradley*, 164 U. S. 113, is cited as authority to the effect that:

> "Whether the use is public or private depends necessarily upon the facts relating to the particular subject matter involved."

The case of *Old Dominion Land Co.* v. *U. S.*, 269 U. S. 55, is cited in an effort to distinguish it from the case at bar.

The remaining three cases, together with the Irrigation Company case and the Hairston case, just mentioned, are referred to on pages 106-107 of the record as follows:

> "It is the law now, as it always has been, that the due process clause of the constitution applies to the state and all of its agencies. *Railroad Co.* v. *Chicago,* 166 U. S. 226; *Railway* v. *Railroad Co.,* 166 U. S. 557. It is equally well settled that condemnation for a non-public use is a denial of due process of law (*Irrigation District* v. *Bradley,* 164 U. S. 112; *Traction Company* v. *Mining Co.,* 196 U. S. 239); and that whether the use is public or private is a judicial question. *Hairston* v. *Railway Co.,* 208 U. S. 598. This latter question is sometimes difficult of solution."

The five cases just noted, would seem to constitute the dependence of the Circuit Court in its opinion. Yet, so far as the questions at issue in those cases are concerned, they in no way help the Court's conclusion. In the case of *Railroad Company* v. *Chicago,* 166 U. S. 226, the city of Chicago condemned a right of way for street purposes across the railroad company's tracks. The jury assessed the compensation at one dollar. The railroad company claimed error on the ground that this amounted to a taking of private property without compensation, and therefore violated the Fourteenth Amendment. The Court agreed that due process of law required that provision for compensation was a necessary element in any law for the appropriation of private property for public use. The Court, however, affirmed the state court in sustaining the verdict on the theory that the jury had found, in effect, that the railroad company had suffered no loss by the appropriation.

The case of *City Ry. Co.* v. *Citizens R. R. Co.* did not arise at all under the Fourteenth Amendment. Its holding was that a certain extension of franchise to the Citizens R. R. Co. granted in 1880 to expire in 1901, was a valid

contract and that an ordinance of the city of Indianapolis declaring it invalid and granting a new franchise to the City Railway Co. was a "law impairing the obligation of contract."

The case of *Fallbrook Irrigation District* v. *Bradley*, is distinctly favorable to the city's position in the cases at bar. The California law provided for the establishment and development of irrigation districts at the expense of the owners of the land included in the respective districts. Mrs. Bradley's property was without her consent included in such a district and was assessed to pay part of the expense. The first assessment not having been paid, proceedings were brought under the act to sell her land. She sought to enjoin on the ground that the proposed irrigation district was of no benefit to her and inured not to the public use but to the private benefit of some of the landowners whose lands would be increased in value. The Court held the use public and sustained the act.

The case of *Traction Co.* v. *Mining Co.*, 196 U. S. 239, seems to decide nothing more than that where diversity of citizenship exists a property owner may transfer to a federal court an action to assess compensation for property appropriated.

The case of *Hairston* v. *Railway Co.* has already been referred to by the city. It sustained the appropriation of a private right of way for a railway spur track.

Nothing in any of the foregoing cases supports the conclusion of the lower courts that the excess appropriation here is not for a public use. Both lower courts referred, without citing them, to certain state cases, in which excess appropriation statutes had been declared unconstitutional. The Circuit Court say, in their opinion (R. p. 108):

> "The courts of last resort in Massachusetts, New York, Virginia and Pennsylvania have held that the

statutes of those states (meaning excess condemnation statutes), at least for the purposes here involved, *were a denial of due process of law.*"

This statement of the Court is not accurate. The cases referred to are the following:

Matter of Albany Street, 11 Wend. (N. Y.) 149.
Opinions of Justices, 204 Mass. 607.
Opinions of Justices, 204 Mass. 616.
Opinions of Justices, 211 Mass. 624.
Mutual Life Insurance Co. v. *Philadelphia*, 242 Pa. St. 47.
City of Richmond v. *Carneal*, 129 Va. 388.

In each of these cases the Court interpreted a state statute on the basis of its understanding of its own state constitutional provisions; in none of them was the constitution of the United States relied on, and in none of them was "due process of law" invoked. In the New York case, decided in the year 1834 (prior to the adoption of the Fourteenth Amendment), the Court arbitrarily held that the legislature had no power to authorize a municipality to take the fraction of an inch more than it intended to use, no matter how small the remnant. In Massachusetts, the holdings were that the legislature could not authorize the expenditure of money raised by taxation to purchase property which was not to be directly used for a public improvement. In the Pennsylvania and Virginia cases, the Court defined public use as equivalent to "use by the public," a definition long since discarded by the federal courts. Furthermore, it is to be noted that the answers to the several decisions in New York, Massachusetts and Virginia have been the adoption of constitutional amendments to specifically confer on the legislatures the necessary authority.

The Pennsylvania and Virginia cases rested squarely upon the point that the respective state constitutions limited eminent domain to public use and that public use meant actual occupancy by the improvement. These states had expressly limited their own powers in a way that precluded any use of excess condemnation. The decisions, therefore, are not authoritative in a case where the state has by its constitution authorized excess condemnation. They especially have no weight in the federal jurisdiction where, as we have seen, the courts have expressly rejected the view that public use must mean use by the public.

We submit that there has been no decision, state or federal, that a state constitution or statute providing for excess condemnation violates the Fourteenth Amendment of the United States Constitution.

5. Difficulties of the Decision of the Lower Courts

The decisions of the lower courts on the question at issue and the reasoning on which they rest, result in certain corollaries which demonstrate the difficulties involved in the conclusion reached by them. The more important of these may be stated as follows:

1. Excess condemnation and due process of law may not exist together in the same governmental jurisdiction.
2. Foreign countries may authorize excess condemnation because their citizens do not enjoy the protection of due process of law.
3. If the citizens of the several states of the Union desire to enjoy the undoubted public benefits of excess condemnation, they must eliminate from their federal and state constitutions the protection of due process of law.
4. The excess condemnation attempted by the city of Cincinnati for the public benefit must be considered as being *for a private use.*

IV. CONCLUSION

1. The traditional system of laying out new streets or widening or altering existing ones or of laying out other important public improvements, under which only the land actually to be used is appropriated, is productive of serious public disadvantage, from the point of view of city planning and sound public financing.

2. Excess condemnation is recognized as a solution of many of the difficulties of the traditional system.

3. Excess condemnation being a beneficent practice intended for the public good, it is within the sovereign power of any government to enact it into law.

4. The "due process of law" clause in the Fourteenth Amendment is not intended to prevent the enactment of beneficial legislation by a state.

5. "Due process of law" is an inherent characteristic of all free governments, controlling them independently of written constitutions. It means "the law of the land" or "a government of laws and not of men."

6. The incorporation of "due process of law" into the federal constitution did not affect the valid law making powers of any state. It merely gave the federal government jurisdiction to prevent any state from enforcing as law an act of tyranny and oppression which could have no just foundation in reason.

7. The Fourteenth Amendment does not require that the taking of private property by eminent domain under state authority must be for the "public use." By failing to follow the language of the Fifth Amendment, the framers of the Fourteenth Amendment refused to restrict state rights of eminent domain except as the assertion of those rights might violate "due process of law."

8. Although the Supreme Court has in numerous decisions referred to "public use" as a test of "due process

of law" in eminent domain cases, it has never set aside a state statute of eminent domain and by identifying "public use" with "public benefit" or "public purpose," it has left the states free to consider their own public purposes in their uses of eminent domain.

9. Excess condemnation as authorized by the constitutions of Ohio and other states has in view solely the public welfare. It aims at no private injury or advantage.

10. In practice excess condemnation does no injury to the individual. It compensates him in full. The only sacred right of which he is deprived is the right to speculate on an anticipated increase in land value arising out of the projected improvement.

11. The cases under consideration are typical cases of excess condemnation. The plats and the other evidence show a reasonable application of the power and that the city council was actuated by no considerations other than the public welfare. If these applications of excess condemnation are invalid, excess condemnation may be considered of no practical value.

We therefore submit that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JOHN D. ELLIS,
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ED. F. ALEXANDER,
Assistant Solicitor.

APPENDIX

Constitutional Provisions as to Excess Condemnation in States Other Than Ohio

Massachusetts

ART. 70. (Rearrangement.) The general court may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or streets, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions. (Adopted 1911.)

ART. 66. (Rearrangement.) The general court shall have power to authorize the commonwealth to take land and to hold, improve, subdivide, build upon and sell the same, for the purpose of relieving congestion of population and providing homes for citizens; provided, however, that this article shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof.

(Adopted 1915.)

Wisconsin

ART. XI, SEC. 3a. The state or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such

public works and improvements, and their environs, and to preserve the view, appearance, light, air and usefulness of such public works. (Adopted 1912.)

New York

ART. I, SEC. 7, PARAGRAPH 2. The legislature may authorize cities to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased. (Adopted 1913.)

Rhode Island

ART. XVII, (Amendment). SEC. 1. The general assembly may authorize the acquiring or taking in fee by the state, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways: Provided, however, that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, street, place, park or parkway. After so much of the land and property has been appropriated for such public highway, street, place, park or parkway as is needed therefor, the remainder may be held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease, the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same. (Adopted 1916.)

Constitution of Virginia

Sec. 58. * * * It (the general assembly) shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the general assembly. * * (Adopted 1928.)

California

Art. I. Sec. 14½. The state, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred and fifty feet from the closest boundary of such public works or improvements; provided that when parcels which lie only partially within said limit of one hundred and fifty feet only, such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

The legislature may, by statute, prescribe procedure. (Adopted 1928.)

Michigan

Art. XIII, Sec. 5. In exercising the powers of eminent domain and in taking the fee of land and property that is needed for the acquiring, opening and widening of boulevards, streets and alleys, municipalities shall not be limited to the acquisition of the land to be covered by the proposed improvement, but may take such other land and property adjacent to the proposed improvement as may be appropriate to secure the greatest degree of public advan-

tage from such improvement. After so much of the land and property has been appropriated for any such needed public purpose, the remainder may be sold or leased with or without such restrictions as may be appropriate to the improvement made. Bonds may be issued to supply the funds to pay in whole or in part for the property so appropriated, but such bonds shall be a lien only on the property so acquired and they shall not be included in any limitation of the bonded indebtedness of such municipality.

(Adopted 1928.)